

APR 6 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1246

STATE OF MARYLAND,
Petitioner.

v.

JOHN W. WHEELER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

MEMORANDUM IN OPPOSITION

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Petitioner contends that the highest Court of the State of Maryland has misapplied the applicable equal protection test established by this Court in determining that §§417 (2) and 418 of Maryland's Obscene Matter Act, Maryland Code (1957, 1976 Repl. Vol.) Art. 27 are unconstitutional; that the test used in cases of economic regulation should have been employed and that review by this Court is necessary to insure consistent equal protection analysis in Maryland.

Petitioner further contends that the Maryland Court of Appeals improperly used in its analysis hypothetical examples having no basis in reality to conclude that the act irrationally and unconstitutionally distinguishes between employees of Motion Picture Theatres and Book Stores.

Respondent, was convicted by a jury of distributing an obscene magazine in violation of §418 of the Obscene Matter Act and fined \$500.00 and costs. The Court of Special Appeals affirmed the judgment and a majority of the Court of Appeals reversed, holding §417(2) and §418 are unconstitutional as violative of the equal protection clause of the Fourteenth Amendment.

1. Respondent wholly agrees with the Petitioner's statement in its brief at page 18: "Reasoned equal protection analysis requires courts to focus on practical experience." (Citation omitted). The Maryland Court of Appeals, in its twenty-one page majority opinion not only considered the practical perspective but also fully addressed the cardinal rule of statutory construction, to wit: to ascertain and carry out the real legislative intention. *Baltimore Gas & Electric Company v. Board*, 278 Md. 26, 31, 358 A.2d 741 (1976). The Court of Appeals deliberately restricted their analysis of §417(2) and §418 to the ordinary and natural import of the statutory language as penal statutes are to be strictly construed. (Citations omitted) In applying the "fair and substantial relationship test" the Court of Appeals found the exemption of motion picture theatre employees did not rest upon some ground of difference having a fair and reasonable relation to the prohibitions of §418 nor have a rational relationship to a legitimate state purpose. Any person so employed is exempt from prosecution and the statute does not limit protection to only the projectionists or motion picture operators as in *Pendleton v. California*, 423 U.S. 1068 (1976) and *Kuhns v. California*, 431 U.S. 973 (1977) upon which the Petitioner relied. Clearly any employee so exempted may, with impunity, engage in conduct that §418

prohibits. Specific duties are not enumerated in the Statute. Such an omission is clear and must be remedied by the Legislature and not the Courts. In reality, the position taken by the Petitioner would allow every exempted employee to distribute obscene matter in violation of §418 while the same act by an employee of a bookstore would result in a crime. Practical experience and the "fair and substantial relationship test" and not the "minimum rationality test" as propounded by the Petitioner have been utilized by the Court of Appeals in holding §418 and 417(2) violate the equal protection clause of the Fourteenth Amendment. At page 18 of its Opinion the Court of Appeals stated:

"In the face of the plain language of the statute, to read the exception for salaried theatre employees in §417(2) to be 'limited to the activities of these employees in 'the showing of motion pictures' and not otherwise,' as the dissenting opinion would have it, (and the Petitioner herein) manifestly puts judicial preference before legislative intent, contrary to the firmly established rules of construction. As the classification applicable to §418 through §417(2) is without any reasonable basis, it is purely arbitrary. We hold that it is constitutionally invalid."

2. The Petitioner submits to this Court that a vital concern in this case is the future shape of federal equal protection analysis in Maryland, suggesting that the decision below is radically at odds with long-standing treatment of such questions. One has but to look at the opinion of the Court of Appeals to see that such concern is misplaced for it is obvious from a close reading of the same that the Court of Appeals took into consideration prior decisions of this Court that it felt were dispositive of the issues as opposed to prior decisions of this Court which were more favorable to the position that Petitioner would have liked the lower Court to

have reached. Therefore certainly the decision of the lower Court has not disturbed the equal protection guaranteed under the Constitution to the United States, but to the contrary, has made a determination allowing individuals similarly circumstanced to receive equal protection of the laws rather than be denied the same by a statute that is unconstitutional facially and in its application.

3. It is obvious that the decision of the Court of Appeals, while leaving Maryland without an obscenity law temporarily, did not leave the General Assembly of Maryland in a quandry as to how to restore the obscenity law for on March 22nd, 1978 acting Governor Blair Lee 3rd signed into law House Bill 747, Ch. 21, an emergency measure effective immediately, that *reenacted* §418 and §417(2) of the Maryland Obscene Matter Act excluding the exemption provision of §417(2) that was found unconstitutional on December 12, 1977 by the Court of Appeals. It is interesting to note that the provision exempting theatre employees was not in the original Obscene Matter Act enacted in the 1967 Acts but added by the 1968 Acts, Ch. 619 only after lobbying by the motion picture projectionists' union. It is clear that with the enactment of H.B. 747 on March 22nd, 1978, the original legislative purpose, to wit: to deter the dissemination of obscene matter by making designated acts of crime punishable by imprisonment and fine applicable to any person, is restored. It is equally clear that the General Assembly of Maryland by §418 and §417(2) of the 1967 Acts and again by H.B. 747 intends the Maryland Obscene Matter Act to apply equally to any person in this area of freedom of speech and not mere economic regulation, contrary to the inference by the Petitioner at page 20 of its Brief. The General Assembly of Maryland must subject all persons, similarly circumstanced, to the prohibitions of Section 418 in compliance with the equal protection clause of the Fourteenth Amendment. On March 22nd, 1978 the State of Maryland, by reenacting its obscenity law, has remedied the "quandry" expressed by the Petitioner and

therefore the urgency also expressed by the Petitioner no longer exists.

4. There is no substantial federal question presented to this Court nor is there a federal statute challenged in the instant case. The highest Court of Maryland, in construing a Maryland Statute has seen fit to declare it unconstitutional upon the Petition of a citizen of Maryland prosecuted and convicted under the statute.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

BURTON W. SANDLER
Counsel for Respondent

March, 1978

A. 1

EMERGENCY BILL

HOUSE OF DELEGATES

81r2064

No. 747

By: Delegate Delegates Owens, Waganan, and Curran
Introduced and read first time: January 13, 1978
Assigned to: Judiciary

Committee report: Favorable with amendments
House action: Adopted
Read second time: February 24, 1978

CHAPTER 21

AN ACT concerning

Crimes and Punishments - Obscene Matter

FOR the purpose of repealing language which provides that certain provisions of the criminal code pertaining to obscene matter do not apply to certain persons; making a technical change to the style of expression of a certain provision of the criminal code pertaining to obscene matter; and reenacting a certain provision of the criminal code which makes it unlawful to sell, distribute, print, exhibit or engage in certain other acts pertaining to obscene matter; and declaring this Act to be an emergency measure to take effect from the date of its passage.

BY repealing and reenacting, with amendments,

Article 27 - Crimes and Punishments
Section 417(2) and 418
Annotated Code of Maryland
(1976 Replacement Volume and 1977 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That section(s) of the Annotated Code of Maryland be repealed, amended, or enacted to read as follows:

Article 27 - Crimes and Punishments

417.

As used in this subtitle,

(2) "Person" means any individual, partnership, firm, association, corporation, or other legal entity[, but

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A. 2

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HOUSE BILL No. 747

shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages].

418.

[Every] ANY person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act is hereby declared to be an emergency measure and necessary for the immediate preservation of the public health and safety and having been passed by a yea and nay vote supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved:

APPROVED BY THE GOVERNOR

Acting Governor.

Speaker of the House of Delegates.

President of the Senate.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Numerals at right identify computer lines of text.

Underlining indicates amendments to bill.

~~Strike-out~~ indicates matter stricken by amendment.